Supreme Court, U.S.
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No._____

IN THE

Supreme Court of the United States

DAVID PALAND

Petitioner,

v.

BOARD OF DIRECTORS FOR THE BROOKTRAILS TOWNSHIP COMMUNITY SERVICE DISTRICT,

Respondents.

On Petition For Writ Of Certiorari To The California Court of Appeal First Appellate District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the California Court of Appeal, First Appellate District, deny equal protection in holding that standby charges on water and sewer lines were fees that did not require a vote under Article XIII D, § 6(b)(4) of the California Constitution, after holding standby charges telephone lines were a special tax that must be voted on?

2. Whether due process and equal protection are denied when a state Court deviates from established rules for interpreting constitutional language in denying parcel owners the right to vote on standby charges?

3. Whether property is taken without due process of law when a special district refuses to bring the issue of water and sewer standby charges before the voters under Article XIII D § 6(b)(4) of the California Constitution?

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App. A contains the opinion of the California Court of Appeal, First Appellate District, and is certified for publication at 179 Cal.App.4th 1358, dated December 3, 2009.

App. B contains the order of the California Supreme Court denying Appellant's petition for review dated February 10, 2010.

App. C contains the Opinion of the California Court of Appeal, First Appellate District, and was depublished when review was granted, dated July 31, 2009.

App. D contains the order denying rehearing in the California Court of Appeal, First District, dated August 27, 2009.

App. E contains the order of the California Supreme Court denying Appellant's petition for review and remanding the case the Court of Appeal for review on its own motion in light of requests for depublication by California attorneys, dated October 14, 2009.

JURISDICTION

The California Court of Appeal entered its opinion on July 31, 2009. (App. C.) A petition for rehearing was denied on August 27, 2009. (App. D.) The California Supreme Court denied petitioner's request for review of this case on October 14 2009, but ordered review of this case on its own motion and transferred this case to the California Court of Appeal, First Appellate

District for review. (App. E). The Court of Appeal entered a final judgment after review on December 3, 2009, after making changes to its opinion regarding procedure for charging fees. (App. A.) On February 10, 2009, the California Supreme Court denied review of the December 3, 2009 order as modified. (App. B.)

Under California Court Rule 8.500, the jurisdiction of the California Supreme Court is limited to cases where "it is necessary to secure uniformity of decision or to settle an important question of law." There was no division between the various appellate districts that required "uniformity of decision", and this Court had already established there is an equal protection right to vote. Petitioner submits that the procedure within the California courts in interpreting the California Constitution in and of itself raises federal due process questions because the courts did not follow established rules for constitutional construction or *stare decisis* as more fully explained below.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

28 U. S. C. § 2403(b) may apply to this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Sec. 1, Amendment 14, United States Constitution:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Article XIII D, Section 6(b)(4) of the California Constitution:

> "No fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question. Fees or charges based on potential or future use of a service are not permitted. Standby charges, whether characterized as charges or assessments, shall be classified as assessments and shall not be imposed without compliance with Section 4."

"Section 4" provides for voting and procedural protections. It is included with the complete texts of California Constitution Article XIII C and Article XIII D which are found in Appendix F. All references

hereafter to "Art." refer to the California Constitution unless otherwise stated.

STATEMENT OF THE CASE

In 1996, California voters passed Proposition 218, enacted by initiative, which added Art. XIII C and D to the California Constitution. (App. 47.)

> "Proposition 218 was designed to: constrain local governments' ability to impose assessments; place extensive requirements on local governments charging assessments; shift the burden of demonstrating assessments' legality to local government; make it easier for taxpayers to win lawsuits; and limit the methods by which local governments exact revenue from taxpayers without their consent."

Silicon Valley Taxpayers' Assn., Inc. v. Santa Clara County Open Space Authority, 44 Cal.4th 431, 448 (2008).

The respondent District is charging parcel owners standby charges for water and sewer while their water is locked off, and sewage is not being discharged.

This petition focuses on the interpretation of Art. XIII D § 6(b)(4) of the California Constitution in the Courts below. The petitioner has argued that Art. XIII D § 6(b)(4) states that standby charges, regardless of the label placed on them, are assessments which must comply with the voting and procedural requirements of Art. XIII D § 4, which applies to all assessments. The courts below have

held that Art. XIII D § 6(b)(4) does not apply to water and sewer lines, although they held that it applies to telephone lines.

The Court of Appeal below, in upholding the opinion of the trial court, held that newly enacted standby charges for water and sewer were fees and not assessments, because once the parcels paid a connection fee and had their homes connected to the water and sewer system the water and sewer were immediately available even after the District locked the water meter off so that the water could not be turned on or used. The Court of Appeal then concluded that since the water and sewer were immediately available, the parcel owners were being charged for service, not standby charges for water and sewer that was not being used. The Court of Appeal previously held in *Bay Area Cellular Telephone Co. v. City of Union City,* 162 Cal.App.4th 686 (1st Dist. 2008), (review den. August 13, 2008), that standby charges on telephone lines were a special tax that required voting under Proposition 218 [Art. XIII D § 6(b)(4)] before standby charges could be imposed.

Petitioner is arguing that he was a denied equal protection and procedural due process by the ruling that standby charges for water and sewer can be taxed without a vote after the previous ruling that standby charges on telephone lines are a special tax that must be voted on. (See Court of Appeal opinion at App. 12 - 13, concluding that charges on the locked off water was a user fee not a standby charge.)

The petitioner became aware of this alleged discrepancy in treatment while researching his

petition for review, and it was brought to the attention of the California Supreme Court on page 9 of a petition for review filed on September 9, 2009, prior to the time the case was returned to the Court of Appeal with directions to review the case. It was again brought to the attention of the California Supreme Court in a subsequent petition to review, filed on December 10, 2009, to review the modified December 3, 2009 ruling of the Court of Appeal. This was several weeks within the 30 day period the Court of Appeal had to change its December 3, 2009 revised order.

Relying on *Bighorn-Desert View Water Agency v. Verjil* (Kelley), 39 Cal.4th 205 (2006), the Court of Appeal concluded that the Supreme Court had determined that, once a person was connected to the District's system, all charges were for service (App. 12 - 13). The petitioner argued that the opinion relied on only referred to charges for "ongoing water delivery," not standby charges. He cited *Bighorn-Desert View Water Agency v. Verjil*, *supra*, at 39 Cal.4th 205, 216, where the California Supreme Court had referred to "ongoing water delivery" in holding that, once connected, all charges for "ongoing water delivery" were for services.

The petitioner argued on p. 11 of his opposition to a motion to dismiss filed in the trial court on November 27, 2007 that the respondents conduct did not meet U.S. Constitutional requirements for due process. ([Trial] Clerk's Transcript 88, 98.) The petitioner had also stated to the Court of Appeal on page 37 of his opening brief filed in the Court of Appeal on December 5, 2008:

> "Participation in the political activity is a fundamental right that requires a compelling state interest before it is interfered with. *Lubin v. Wilson,* 232 Cal.App.3d 1422, 1428 (4th Dist., 1991). There is no compelling state interest that requires the defendants ignore Art. 13D notice requirements and interfere with fundamental rights embodied in Art 13D."

Specifically, Art. XIII D § 4 (App. 51), and Art. XIII D § 6(b)(4) (App. 56) contain procedural safeguards, which specify notice requirements and the right to vote on standby charges.

On pp. 15 - 17 of his opening brief in the Court of Appeal and p. 11 of an his opposition to a motion to dismiss in the trial court, the petitioner cited *Lambert v. California* 355 U.S. 225, 228 (1957), for the proposition that his property was being taken without due process. He argued, voters expected a mailed notice with a ballot before standby charges were imposed, but the charges were merely discussed at a public hearing where property rights would be lost if legal action were not taken within 100 days.

The petitioner argued, on p. 8 of his reply brief in the Court of Appeal, that the trial court's holding that the standby charge is a user fee and not a standby charge is inconsistent with the rules of constitutional construction which require constitutional provisions to be interpreted using the ordinary meaning of words. The petitioner argued on page 23 - 26 of his first petition for review filed on September 9, 2009 that the Court of Appeal did not

use the ordinary use of the words "immediately available" or effectuate the intent of the voters to allow voter approval of charges. The Court of Appeal held that water is immediately available, even when locked off by the respondents. On p. 25 - 26 of the second petition for review filed on December 10, 2009, within the 30 day period while the Court of Appeal still had time to change its December 3, 2009 ruling pursuant to Cal. Court Rule 8.264(b), the petitioner further argued that the specific voting provisions of Article XIII D § 6(b)(4) prevailed over any other general provisions, because § 6(b)(4) specifically dealt with standby charges and specific provisions prevail over general provisions.

The respondents had argued that once the petitioner was connected to their system he was a customer, and standby charges were therefore fees for a service. The petitioner responded to this on page 12 - 13 of his reply brief in the Court of Appeal, stating that charging petitioner a standby charge for part of the system that petitioner paid for - the water and sewer connections - was unlawful double recovery.

Although petitioner cited dictum in a dissenting California Supreme Court opinion in his reply brief for the proposition that double recovery is not allowed, he later supplied direct authority for his argument, citing *Sutter Butte Canal Co. v. Railroad Com.*, 202 Cal. 179, 190 (1927), (Affd. 279 U.S. 125) on p. 14 of his petition for review filed on September 9, 2009, and on p. 13 of his second petition for review filed on December 10, 2009.

The Court of Appeal appears to have avoided the federal questions of due process raised by the respondent's alleged failure to follow notice and voting requirements of California Art. XIII D § 4 on standby charges by stating that the charges on the locked off services were fees for services that were immediately available [and therefore did not require voting as standby charges because Art. XIII D § 6(b)(4) voting requirements only apply to services that are not immediately available]. The petitioner claimed that his due process rights were violated when the respondents did not bring the standby charges for water and sewer to a vote on p. 15 of his opening brief in the Court of Appeal.

The Court of Appeal concluded that Art. XIII D §§ 6(b)(1) - (4) permitted charges on connected parcels even when the services were not actually used. (App. 19 - 20.) Petitioner responded to this on p. 19 of his petition for review, and p. 18 of his second petition for review, citing authority for the proposition that charges for maintenance and improvements are assessments, and assessments must follow Art. XIII D § 4 notice and voting requirements which apply to all assessments. (See § 4 at App. 51.)

REASONS FOR GRANTING THE PETITION

A. Review is required to establish whether constitutional provisions brought by initiative were interpreted in a way that denies procedural due process and equal protection in the right to vote on standby charges.

In *Bush v. Gore*, 531 U.S. 98, 104 - 105 (2000), this court held that equal protection requires that each persons vote be weighted equally:

> "The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another. See, e.g., *Harper v. Virginia Bd. of Elections*, 383 U. S. 663, 665 (1966) ('[O]nce the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment'). It must be remembered that 'the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.' *Reynolds v. Sims*, 377 U. S. 533, 555 (1964)."

The initial vote on Proposition 218, which is now embodied in Article XIII C and D of the California Constitution, is not being weighted equally because the Court of Appeal has required a vote on standby charges on telephone lines under Article XIII D § 6(b)(4), but denied the right to vote on standby charges placed on water and sewer lines. The ruling also takes away voter's right to vote on standby charges and takes voter's property without the procedural due process of notice and voting on standby charges that was enacted into Art. XIII D §

6(b)(4) and Art. XIII D § 4. Telephone customers may vote on standby charges on their telephone lines but water and sewer customers may not vote on standby charges for water and sewer lines.

B. Review is required to establish whether the words of Art. XIII D § 6(b)(4) were given their ordinary meanings is denying the right to vote on standby charges.

Article XIII D, § 6(b)(4) defines standby charges for services that are not "immediately available" as "assessments". (App. 56.) The Court of Appeal concluded that the charges being applied to parcel's for water and sewer service, regardless of actual use, are not a standby charges, and therefore not assessments subject to voting requirements. The Court held that the service is immediately available even when the water is locked off by the District. (App. 2.) But this conclusion is not supported by the ordinary use of the word "immediately" as found in Art. XIII D § 6(b)(4)'s standby charge provisions which defines standby charges as those which are not "actually used or immediately available" to the parcel owner.

In *Bighorn-Desert View Water Agency v. Verjil, supra,* at 39 Cal.4th p. 212, the Court stated:

> "When interpreting a provision of our state Constitution, our aim is "to determine and effectuate the intent of those who enacted the constitutional provision at issue.' (Richmond, supra, 32 Cal.4th at p. 418.) When, as here, the voters enacted the provision, their intent governs. [Citation.]

> To determine the voters' intent, 'we begin by examining the constitutional text, giving the words their ordinary meanings.' (*Richmond, supra*, at p. 418.)"

The word "immediately" has been defined as:

> "1. without lapse of time; without delay; instantly; at once. 2. affecting directly. 3. with no object or space intervening. 4. closely; *immediately in the vicinity*. 5. *Chiefly Brit.* immediately that; the moment that; as soon as."

Random House Dictionary of the English Language, The Unabridged Edition (1967).

Using the Random House Dictionary definition of "immediately", services that are immediately available must be provided " without lapse of time, without delay; instantly; at once...with no object or space intervening...." The charges being imposed by the District are for having water standing by that is only available when the intermediary from the District unlocks it after the District feels its intervening right to payment has been satisfied. Thus, service is blocked by both time and the intervening agency of the District required to turn on service. They are therefore charges for service that is not immediately available to the user until the intermediary from the District decides to turn them on after its conditions for turning on the water are met.

The words in Article XIII D, § 6(b)(4) should be interpreted using their ordinary meanings. The words "immediately available" should mean just that -

water that can be turned on and use instantly and without delay. Article XIII D § 6(b)(4) further states: "Standby charges, whether characterized as charges or assessments, shall be classified as assessments and shall not be imposed without compliance with Section 4." "Section 4" requires notice, voting, and other requirements before imposing assessments. (See Section 4 at App. 51.)

The use of other than the ordinary meanings of the words "immediately available" and "actually used" by the Court of Appeal denies parcel owners their due process right to vote on standby charges, and the same protection that was given to the plaintiffs in *Bay Area Cellular Telephone Co., supra,* in a similar situation involving standby charges on telephone lines. The decision renders the initial vote on Proposition 218 meaningless, as admonished by the court in *Bay Area Cellular Telephone Co., supra*, at 162 Cal.App.4th p. 698, fn. 11. Changing the ordinary meaning of the words "immediately available" that were contained in Art. XIII D § 6(b)(4) takes away control of standby charges and assessments from the property owners, defeating the intent of Proposition 218.

C. Review is needed to establish whether denying the right to vote on standby charges follows the intent of the initiative measure which established Articles XIII C and D.

The Court of Appeal concludes that the terms "immediately available" and "potential or future use of a service", as used in the initiative, are relative and imprecise. (App. 15.) In *Silicon Valley Taxpayers'*

Assn., Inc.v. Santa Clara County Open Space Authority, 44 Cal.4th 431 (2008), the court stated:

> "Proposition 218 was designed to: constrain local governments' ability to impose assessments; place extensive requirements on local governments charging assessments; shift the burden of demonstrating assessments' legality to local government; make it easier for taxpayers to win lawsuits; and limit the methods by which local governments exact revenue from taxpayers without their consent."

(*Id. at p.* 448.) Limiting charges to services that are "immediately available" and requiring voting on standby charges for "potential or future use of a service" as described in Art. XIII D § 6(b)(4) could be done in a way that promotes the purposes of Proposition 218 by placing control of charges and assessments in the hands of property owners.

D. Review is required to establish that Article XIII D § 6(b)(4) specific provisions which require voting on standby charges prevail over general provisions in Article XIII D § 6(c) that allow fees for services to be increased without a vote.

There is an exception in Article XIII D, § 6(c) that allows the water and sewer fees for services to be increased without a vote, while other services must be voted on because § 6(c) does not provide an exception for them. However, once service is discontinued and the water locked off by the District, the charges should then fall under the more specific exception

which defines all standby charges for services that are not actually used as assessments, and provides that standby charges must be voted on. Article XIII D, § 6(b)(4). There is no exception in § 6(b)(4) for water, sewer, and refuse collection services that excludes them from its specific standby charge provisions. Once defined as assessments, water and sewer services should be required to follow the notice and voting procedures found in Art. XIII D § 4, which applies to all assessments.

The California Supreme Court has held that a specific provision relating to a particular subject will govern a general provision, even though the general provision standing alone would be broad enough to include the subject to which the specific provision relates. *San Francisco Taxpayers Assn. v. Board of Supervisors*, 2 Cal.4th 571, 577 (1992). The general provisions of § 6(c) which exclude fees for water, sewer and refuse collection services from voting requirements is broad enough to include standby charges for those things. However, it should be controlled by the more specific provisions of § 6(b)(4) which defines all standby charges as assessments, requires voting on standby charges, and does not provide an exception for water, sewer or refuse collection services in defining standby charges as assessments. This interpretation promotes the purpose of Proposition 218 to provide more voter approval, and is consistent with the opinion of the California Attorney General, which the petitioner relied on in bringing this case. His opinion states:

> "A municipal water district may not impose a standby charge at an increased rate

> without providing notice to landowners and obtaining voter approval of the charge even if the rate was specified in a previously adopted engineer's report covering the year in question and was approved by the district's board of directors prior to November 6 1996."

82 Op.Atty.Gen. 35.

In *Cornette v. Department of Trnsp.*, 26 Cal.4th 63, 73 - 74 (2001), the court stated:

> "When one part of a statute contains a term or provision, the omission of that term or provision from another part of the statute indicates the Legislature intended to convey a different meaning. [Citation.] A court may not rewrite a statute, either by inserting or omitting language, to make it conform to a presumed intent that is not expressed. [Citations.]"

In the instant case, the exception that permits increases in water and sewer fees without a vote, found in Section 6(c), was excluded from Section 6(b)(4)'s treatment of standby charges in defining standby charges as assessments. The omission of the exception for water and sewer from Section 6(b)(4) when it was included in Section 6(c) demonstrates an intent to exclude it from Section 6(b)(4), and to treat standby charges for water and sewer as assessments that must be voted on like standby charges for other types of services. The drafters could have placed the exclusion for water and sewer in Section 6(b)(4) as they did in Section 6(c), but they did not do that.

Following the holding in *Cornette v. Department of Trnsp., supra,* it may be concluded that the failure to include the exclusion for water and sewer in Art. XIII § 6(b)(4)'s standby charge provisions was intentional.

E. Review is needed to determine whether equal protection and due process were denied by inconsistent decisions in the Court below.

In *Bay Area Cellular Telephone Co. v. City of Union City, supra,* a fee was being charged to phone customers for an emergency 911 service. The Ordinance applied to all persons who maintained telephone service, not just to new customers. The fee was based on the presence of a telephone line, not on actual use of the emergency services. The fee was also charged to those who had never used the service. Giving its reasoning for concluding that such a charge is *not* a legitimate user fee, the Court of Appeal, First Appellate District, stated:

> "A fee for access to a governmental service is not the same as a fee for use of that service."

(*Bay Area Cellular Telephone Co., supra,* at 162 Cal.App.4th at p. 698.) The Court explained its reasoning as follows:

> "Indeed, if it were, Proposition 218 could easily become meaningless. Taxes paid by the public to fund police or fire services available to all could be renamed 'public safety access fees' and be exempt from the voter approval requirements. Taxes paid to maintain city streets could be renamed 'road

> access fees.' The list of possibilities is endless."

(*Bay Area Cellular Telephone Co., supra,* at 162 Cal.App.4th p. 698, fn. 11.).

In the instant case, taxes are being assessed to maintain the water and sewer lines that run in front of nearly every parcel in the District, and are being labeled as fees for a service. But only parcel owners who have paid the connection fee are assessed monthly base rate standby charges. The Court of Appeal appears to be labeling a standby charge, defined as an assessment under Article XIII D, § 6(b)(4), as a water and sewer access fee, departing from the admonition in *Bay Area Cellular Telephone Co., supra*. Labeling standby charge assessment for capital improvements as a fee for services removes the parcel owner's control over assessments, and removes the security of property ownership. The ability to tax is only limited by what the District charges as a base rate.

The holding in the instant case raises the question of why the Court of Appeal did not follow the reasoning found in *Bay Area Cellular Telephone Co., supra,* where it had previously concluded, "A fee for access to a governmental service is not the same as a fee for use of that service." It would seem that *Stare decisis* should be applied to uphold the principle set forth in the prior ruling as a matter of equal protection, and as a matter of due process. As in *Bay Area Cellular, supra,* voting should be required before standby charges are imposed. The Court in *Bay Area Cellular* held that fees for mere access to service

without actual use were subject to voting requirements under Proposition 218, stating:

> "The principles discussed above lead us to conclude that the Fee is a special tax, and as such is subject to Proposition 218."

(*Bay Area Cellular Telephone Co., supra.*, at 162 Cal.App.4th, p. 695.) Article XIII D, § 2(e) provides:

> " 'Fee' or 'charge' means any levy other than an ad valorem tax, a special tax, or an assessment, imposed by an agency upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property related service."

(App. 50.) The above section indicates that special taxes are not fees. The Court of Appeal held in *Bay Area Cellular Telephone Co., supra,* that a charge for the privilege of having a telephone line was a "special tax" that required voting. Article XIII D § 2(e) as set forth above defines a "[f]ee" or "charge" as "any levy *other than...a special tax*...imposed by an agency upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property related service." (*Italics* added.) So the respondent's charge is not a "fee" or "charge" for a property related service but a special tax if the holding in *Bay Area Cellular Telephone Co., supra,* is followed. In departing from its previous holding, the Court of Appeal in the instant case stated:

> We conclude that a minimum charge imposed on parcels with connections to a water district's utility systems for the basic

> cost of providing water or sewer service, regardless of actual use, is a charge for an immediately available property-related service as defined in article XIII D, section 6, subdivision (b)(4), and consequently does not require ballot approval by affected owners.

(App. 2.) In summary, the Court in the instant case stated that a standby charge on water and sewer connections was a fee for a service that did not require voting. But in *Bay Area Cellular Telephone Co., supra,* the Court said it was a special tax that required voting. The Court of Appeal relied on the decision in *Bighorn-Desert View Water Agency v. Verjil, supra*, in concluding that the Respondent's standby charge was a user fee for a service. Quoting from *Bighorn* the Court of Appeal stated:

> "Our Supreme Court has also indicated, however, that 'domestic water delivery through a pipeline is a property-related service within the meaning of [article XIII D]. ([*Richmond, supra*, 32 Cal.4th] at pp. 426-427.) Accordingly, once a property owner ... has paid the connection charges and has become a customer of a public water agency, all charges for water delivery incurred thereafter are charges for a property-related service, whether the charge is calculated on the basis of consumption or is imposed as a fixed monthly fee.' (*Bighorn, supra*, 39 Cal.4th at p. 217, italics added, fn. omitted.)"

(App. 12 - 13.) The above quotation from *Bighorn* cited by the Court of Appeal appears to define both consumption based fees and fixed monthly fees, as actual use of a service. But it does not address the situation where services are turned off. However, the court in *Bighorn, supra*, at 39 Cal.4th, p. 216 stated:

> "It is sufficient to concluded that a public water agency's charges for ongoing water delivery, which are fees and charges within the meaning of article XIII D (*Richmond, supra*, 32 Cal.4th at pp. 426-427), are also fees within the meaning of section 3 of article XIII C."

The words "ongoing water delivery" in the above quote would indicate that the Court in *Bighorn* was referring to actual use of water, and not standby charges. If the Court did intend to include standby charges as user fees then it's ruling would be inconsistent with Art. XIII D § 6(b)(4) which defines all standby charges as assessments. New assessments require compliance with Section 4 [voting] as set forth above in Article XIII D § 6(b)(4). *Keller v. Chowchilla Water Dist.*, 80 Cal.App.4th 1006, 1009 (5th Dist. 2000).

As a matter of equal protection and due process voting should be allowed on water and sewer lines if it is allowed on telephone lines.

F. Review is required to determine whether strict scrutiny should be applied to the denial of voting on standby charges.

In *Plyler v. Doe*, 457 U.S. 202, 217, fn. 15 (1982), this Court indicated that the right to vote falls under the strict scrutiny test even thought it is not a constitutionally protected right:

> "In determining whether a class-based denial of a particular right is deserving of strict scrutiny under the Equal Protection Clause, we look to the Constitution to see if the right infringed has its source, explicitly or implicitly, therein. But we have also recognized the fundamentality of participation in state 'elections on an equal basis with other citizens in the jurisdiction,' *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972), even though 'the right to vote, per se, is not a constitutionally protected right.' *San Antonio Independent School Dist., supra*, at 35, n. 78. With respect to suffrage, we have explained the need for strict scrutiny as arising from the significance of the franchise as the guardian of all other rights. [Citations.]"

The holding in *Plyler v. Doe, supra,* indicates that the *strict scrutiny* standard may be applied to protect voting rights, and following that rule in the instant case would protect both the right to vote and the underlying property rights.

G. Review is required to establish whether there is a compelling state interest important enough to justify the interference with the right to vote on standby charges which was

obtained through the initiative process with Proposition 218.

Once the water and sewer standby charges are classified as assessments in Art. XIII D § 6(b)(4) and it is established that there is a right to vote on these assessments, that right should not be abridged without a compelling state interest.

The Court of Appeal concluded that appellant's "actual use" would further burden the system. (App. 19.) This indicates that the Court felt that parcel owners having water connections that are completely paid for through large connection fees paid by the parcel owners is justification for allowing charges even when the water is locked off by the respondents and, as a result, sewer is not used either.

This Court found there was unlawful double recovery in *Sutter Butte Canal Co. v. Railroad Com., supra,* when additional charges were placed on part of the system already paid for by the property owner. Placing standby charges on connections that petitioner paid $1,800 for, and parcel owners now pay $10,000 for to obtain additional revenue, should not be a compelling state interest that justifies ignoring voting requirements. It should not even meet the rational basis test. It is double recovery.

The Court of Appeal indicated that the standby charges are necessary to maintain the districts system stating:

> "Common sense dictates that continuous maintenance and operation of the water and sewer systems is necessary to

> keep those systems immediately available to inactive connections like Paland's."

(App. 20.) But the respondents may increase rates on those who actually use the system just like other utilities do. This is a less onerous method of paying for maintenance on water and sewer lines. Taking away the right to vote on standby charges and double charging for part of the system that was paid for by the parcel owners is unnecessary.

H. Review is sought to establish whether water and sewer standby charges are assessments that must be voted on, or fees for a service that do not have to be voted on.

In *California Psychiatric Transitions, Inc. v. Delhi County Water Dist.*, 111 Cal.App.4th 1156 (5th Dist. 2003), the court stated:

> "Fees are the charges for actually connecting to the sewer or water system and cannot exceed "the estimated reasonable cost of labor and materials for installation" of the connection and peripheral equipment. (§ 66013, subd. (b)(5).) Capacity charges are to fund existing or proposed capital improvements 'that are of benefit to the person or property being charged.' (§ 66013, subd. (b)(3).) Funds collected as capacity charges are to be maintained in a separate capital facilities fund. (§ 66013, subd. (c).)"

(*Id.* at 111 Cal.App.4th pp. 1159 - 1160.)

The Court also concluded:

> "charges are user fees (in the case of connection fees) or special assessments (in the case of capacity charges)."

(*Id.* at 111 Cal.App.4th p. 1161.) The petitioner stated the foreging on page 19 of his petition for review, and page 18 of his second petition for review. The Court of Appeal stated:

> Nor does he cite statutory or other legal authority barring the District from charging him for maintenance, operation, and capital improvements to the existing systems once he has paid a connection fee. Both Proposition 218 and the Government Code authorize the District to do just that. (Art. XIII D, § 6, subd. (b)(1)–(4); § 66013, subd. (b)(3) [authorizing capacity charges].)

(App. 19 - 20.) Reviewing Art. XIII D, § 6, subd. (b)(1)–(4) as cited by the Court of Appeal above, these sections appear to allow charges for maintenance and improvements to be included in *fees for services*. Petitioner submits that Court of Appeal erred in concluding that charges for "maintenance, operation, and capital improvements" may be imposed as standby charges without a vote. In *California Psychiatric Transition, Inc. v. Delhi County Water Dist., supra,* the court stated that capacity charges for improvements are assessments. Under that holding, costs being assessed by the respondents for improvements to their system would be assessments. As assessments, standby charges must comply with Art. XIII D § 4 voting because § 4 requires voting for *all* assessments. (App 54.)

CONCLUSION

Overall, the procedure in the state courts has denied due process and equal protection. Established rules of statutory interpretation and *stare decisis* are departed from in interpreting the State Constitution. The ordinary meanings of words in the State Constitution are interpreted to conclude that services are actually used and immediately available to those with their water turned off. This takes away the vote on Proposition 218, and the right to vote on standby charges for those who have water and sewer lines running in front of their property.

For the foregoing reasons, it is respectfully requested that this Court grant the petition for writ of certiorari.

Respectfully submitted,

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February 23, 2010

APPENDIX A

Filed 12/3/09

CERTIFIED FOR PUBLICATION
IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FIVE

DAVID PALAND, Plaintiff and Appellant, v. BROOKTRAILS TOWNSHIP COMMUNITY SERVICES DISTRICT BOARD OF DIRECTORS, Defendant and Respondent.	A122630 (Mendocino County Super. Ct. No. SCUK CVG 07 99168)

This appeal requires us to construe certain provisions in the taxpayer initiative Proposition 218 (Cal. Const., arts. XIII C, XIII D)[1] distinguishing between what may properly be classified as a property-related fee, exempt from a requirement for ballot approval by a majority of affected property owners, and an

[1] All article references are to articles of the California Constitution.

assessment for which such a vote is mandated. We conclude that a minimum charge imposed on parcels with connections to a water district's utility systems for the basic cost of providing water or sewer service, regardless of actual use, is a charge for an immediately available property-related service as defined in article XIII D, section 6, subdivision (b)(4), and consequently does not require ballot approval by affected owners. We therefore affirm the trial court's judgment for the water district.

BACKGROUND

The Brooktrails Township Community Services District (District) was formed to provide water and sewer service to about 6,500 real property parcels in or near Willits, California. (Gov. Code, § 61000 et seq.)[2] About 1,536 of the parcels are currently connected to the District's water system, and about 1,490 are connected to its sewer system. The rest of the parcels are undeveloped and not yet connected to the District's utility systems. Parcels not connected to the water and sewer systems are charged annual water availability and sewer standby fees. Parcels connected to the water and sewer systems are charged connection fees at the time of hookup to the systems, and thereafter fixed monthly water and sewer "base rates," as well as inclining usage-based rates for water service. The sewer connection is not a metered

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[2] All statutory references are to the Government Code unless otherwise indicated.

service, and is therefore not subject to a usage charge beyond the monthly base rate.

Appellant David Paland, a property owner in the District, connected his parcel to the water and sewer systems in 1986 and paid $1,800 in connection fees. In the decades that followed, he periodically discontinued his water service when he was away from his home for extended periods of time or when he asserts he could not afford the service. On such occasions, he was historically charged a prorated amount of the water and sewer base rates for the month in which his service was discontinued and was not charged again until he requested reactivation of his water service. Until 2003, it was District policy not to charge base rates to parcels with existing connections that were inactive because the parcels were either undeveloped or unoccupied, or because the owners had temporarily discontinued their service.

The District changed its policy in 2003. At the time, the state Department of Health Services had imposed a moratorium on new connections pending an increase in the District's water storage capacity. The Department of Health Services mandates increased the District's capital investment costs and eliminated its income from new connections.[3] On March 11, 2003, the District's Board of Directors (Board) decided

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[3] Counsel for the District represented that the cost of a new connection, assuming one could be obtained at all, was about $10,000 at the time of trial.

to begin charging established monthly base rates[4] to parcels with existing utility connections, regardless of whether the owner was actually using the District's services.[5] On April 24, 2003, District General Manager Michael Chapman wrote to Paland and 20 other property owners with currently or periodically inactive water meters informing them of the change of policy.

Paland protested the new policy. He questioned Board's statutory authority to impose monthly base rates on inactive connections, arguing that the practice was "in the nature of a standby fee" and that the Board had not complied with Proposition 218 or due process. Although the Board did not rescind its policy, Paland took no immediate legal action because he "did not become aware that the thing had actually gone through as any kind of ordinance . . . ." He did not discontinue his water service between 2003 and 2006.

In late 2006, Paland fell behind on his monthly bills. In October 2006, the District notified him that his service would be shut off if he did not pay the arrears. In a letter to the District General Manager dated December 25, 2006, Paland wrote that his water had been turned off, that he would pay the arrears as soon as he could, that he could not afford to

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[4] The base rates charged to connected parcels are used to pay the fixed costs of operating and maintaining the water and sewer systems, as well as the capital costs of increasing the District's storage capacity so that it can continue to serve those already-connected customers.

[5] Monthly base rates for water service were $32.45 at the time of trial, and the basic monthly sewage fee was $30.07.

pay ongoing base rates because he was unemployed, and, "For that reason, I have no plans to ask you to turn the water back on until I can afford the huge base rate." By the end of January 2007, Paland apparently had paid his arrears through November 2006. Paland's subsequent monthly bills reflect no actual water usage. The District, however, continued to charge Paland the monthly base rates for both water and sewer services.

On May 17, 2007, Paland sued the Board for declaratory and injunctive relief.

He alleged that in 2007, pursuant to the 2003 policy, the District began charging him monthly base rates (as adopted in Resolution No. 2006-17 on June 27, 2006) for time periods when he had requested that his water service be turned off. He again argued the monthly base rates, when charged to customers whose water service had been turned off, were "standby charges" subject to the owner voting requirements of article XIII D, section 4, and that the District had failed to comply with those requirements. He sought a declaration that Resolution No. 2006-17 was invalid on its face and as applied to him and also sought an injunction barring the resolution's enforcement "prior to complying with applicable voting laws." The District filed a demurrer on the ground that the complaint was filed outside the limitations period of section 66022, which provides that any judicial action to challenge a local agency resolution adopting a new fee or service charge must be commenced within 120 days of the effective date of the resolution. (§ 66022, subd. (a).) The court sustained the demurrer with leave to amend.

Paland filed an amended complaint alleging that the District adopted new water and sewer base rates on June 26, 2007, in Resolution No. 2007-10, that the resolution was subject to the requirements of article XIII D, section 4, and that the District had not complied with those requirements. The Board answered the amended complaint and filed a motion to dismiss on statute of limitations grounds. The trial court ruled that Paland's renewed challenge to the 2003 policy was time-barred, but his challenge to the 2007 action of the Board was not.

Trial took place on July 8, 2008. At the conclusion of the one-day trial, the court made the following oral ruling:[6] "As to the request for declaratory relief as to Resolution 2007-10, the court finds that the Defendant or Respondent's resolution is constitutionally valid and in compliance with all applicable law. It appears that the appropriate procedures under Prop 218 for changing a rate and having it be in proportion, giving due notice to those affected, if [they] applied at all, were followed in this case. [¶] On the other hand, I think that what is driving this litigation is a fundamental confusion about whether the type of fees that Petitioner, Mr. Paland, is challenging are in fact standby fees or assessments. The court finds that they are not. [¶] The water and sewer fees in question are in fact user

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[6] Paland made an oral request for a written statement of decision. That request was denied by the court on the basis that the trial had been of less than eight hours duration. (Code Civ. Proc., § 632). His subsequent written request was denied as well.

fees which can be increased to reflect capital improvements, changes in costs for providing the service, and that a base rate is a proper and important component of such a change in fee. [¶] For these reasons the court denies the request for injunctive relief and finds that Petitioner or Plaintiff shall take nothing by his complaint." The court entered judgment for the Board.

DISCUSSION

The core issue in this appeal is whether the imposition of minimum monthly water and sewer base rates on parcels connected to the District utility systems, regardless of actual usage, is a property assessment subject to owner ballot approval requirements adopted in Proposition 218, or is instead a fee or charge for a property-related service exempted from those requirements.[7] Paland argues only that the District failed to comply with Proposition 218's procedural and voting requirements for *assessments*, and does not contend that the District failed to comply with requirements for imposition of water or sewer *fees*. We conclude the disputed charges are fees and not assessments as defined in the initiative.

In 1996, California voters passed Proposition 218, which added articles XIII C and XIII D to the California Constitution. The initiative was intended

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[7] The District does not contest that the charges are subject to Proposition 218, but only disputes Paland's claim that they are assessments rather than fees under the terms of the initiative.

to close perceived loopholes in the restrictions on property taxes imposed by Proposition 13.[8] (*Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 838–839; *Howard Jarvis Taxpayers Assn. v. City of Riverside* (1999) 73 Cal.App.4th 679, 681 (*Riverside*).) Articles XIII C and XIII D "allow[] only four types of local property taxes: (1) an ad valorem property tax; (2) a special tax; (3) an assessment; and (4) a fee or charge." (*Riverside, supra*, at p. 682.) Article XIII C imposes restrictions on general and special property taxes in addition to those imposed under article XIII A, and requires voter approval for any general or special tax imposed by a local governmental entity. The second component of Proposition 218, article XIII D, is addressed to "Assessment and Property-Related Fee Reform," and it "undertakes to constrain the imposition by local governments of 'assessments, fees and charges.' (Art. XIII D, § 1.)" (*Pajaro Valley Water Management Agency v. Amrhein* (2007) 150 Cal.App.4th 1364, 1378.) "Article XIII D sets forth procedures, requirements and voter approval mechanisms for local government assessments, fees and charges."[9]

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[8] Proposition 13, which was adopted by voters on June 6, 1978, added article XIII A to the California Constitution. (*Knox v. City of Orland* (1992) 4 Cal.4th 132, 140.)

[9] "Fee" and "charge" appear to be synonymous in article XIII D. (*Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205, 214, fn. 4 (*Bighorn*).) Hereafter, we use the term "fee" to refer to both.

(*Howard Jarvis Taxpayers Assn. v. City of Roseville* (2002) 97 Cal.App.4th 637, 640 (*Roseville*).)

For new or increased property assessments, article XIII D requires agencies to obtain an engineer's report on the assessment and mail detailed notice to affected property owners, explaining the reason for and the method of calculating the assessment and identifying the amount chargeable to the owner's particular parcel. (Art. XIII D, § 4, subds. (b), (c).) The notice must provide the date, time, and place of public hearing on the assessment, include a ballot "whereby the owner may indicate his or her name, reasonable identification of the parcel, and his or her support or opposition to the proposed assessment," and conspicuously describe the procedures for tabulation of those ballots. (Art. XIII D, § 4, subds. (c), (d).) When tabulated at the public hearing, the ballots are weighted according to the proportional financial obligation of each affected parcel. (Art. XIII D, § 4, subd. (e).) If a majority of the weighted ballots oppose the assessment, it may not be imposed. (*Ibid.*)

For new or increased property-related fees, the initiative also requires detailed mailed notice to affected property owners, explaining the proposed fee and announcing a public hearing. (Art. XIII D, § 6, subd. (a)(1).) However, no formal balloting is required at this stage of the process. (*Ibid.*) Instead, "[a]t the public hearing, the agency shall consider all protests against the proposed fee or charge. If written protests against the proposed fee or charge are presented by a majority of owners of the identified parcels, the agency shall not impose the fee or

charge." (Art. XIII D, § 6, subd. (a)(2).) If a majority protest does not occur, then "[e]*xcept for fees or charges for sewer, water, and refuse collection services*," the fee still may not be imposed or increased "unless and until that fee or charge is submitted and approved by a majority vote of the property owners of the property subject to the fee or charge or, at the option of the agency, by a two-thirds vote of the electorate residing in the affected area." (Art. XIII D, § 6, subd. (c), italics added.)[10]

In short, if the monthly water and sewer base rates charged to Paland were assessments, ballot approval of the base rates was required under article XIII D, section 4. If, however, the base rates are fees, only a majority protest hearing was required because water and sewer (and refuse collection) fees are exempt from the ballot approval requirement for fees set forth in article XIII D, section 6, subdivision (c).

The narrow focus of this dispute is the proper interpretation and application of article XIII D, section 6, subdivision (b)(4), which provides "A fee or charge shall not be extended, imposed, or increased by

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[10] Article XIII D defines fee or charge as "any levy other than an ad valorem tax, a special tax, or an assessment, imposed by an agency upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property-related service." (Art. XIII D, § 2, subd. (e).) "Property-related service" is defined as "a public service having a direct relationship to property ownership." (*Id.*, § 2, subd. (h).)

any agency unless it meets all of the following requirements: [¶] . . . [¶] (4) No fee or charge may be imposed for a service unless that service is actually used by, or *immediately available to*, the owner of the property in question. Fees or charges based on potential or future use of a service are not permitted. *Standby charges, whether characterized as charges or assessments, shall be classified as assessments and shall not be imposed without compliance with Section 4.*" (Art. XIII D, § 6, subd. (b)(4), italics added.)

Paland argues that, despite the existence of a metered connection for water service at his parcel, that service is still not immediately available to him, and to those similarly situated with inactive connections, and therefore the imposition of minimum base rates on such parcels is a standby charge that must be classified as an assessment under article XIII D, section 6, subdivision (b)(4).[11] He

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[11] Paland also contends that charges for maintenance and operations costs are by definition assessments rather than fees within the meaning of Proposition 218. He cites the definition of "assessments" in the Legislature's statutory implementation of the initiative, which provides: " 'Assessment' means any levy or charge by an agency upon real property that is based upon the special benefit conferred upon the real property by a public improvement or service, *that is imposed to pay* the capital cost of the public improvement, *the maintenance and operation expenses of the public improvement*, or the cost of the service being provided." (§ 53750, subd. (b), italics added.) Similar language appears in the initiative. (See art. XIII D, § 5, subd. (a) [exempting assessments predating Proposition 218 imposed exclusively to finance the capital costs *or maintenance and operation expenses* for water and sewer systems, except for subsequent increases].) These provisions establish that an assessment may be imposed to pay maintenance and operation

asserts that water service[12] is not immediately available to him when his connection is inactive because the District would have to unlock his water meter before he could use the service. Also, he argues the service is not immediately available because the District will not unlock his meter unless he pays his past-due bills. In his view, the service is not immediately available unless he can "twist his tap and turn on the water." If, as Paland contends, the minimum monthly base rate charged by the District is indeed a standby charge, it would unquestionably be subject to article XIII D, section 4 assessment approval procedures. (Art. XIII D, § 5, subd. (a); *Keller v. Chowchilla Water Dist.* (2000) 80 Cal.App.4th 1006, 1012 (*Keller*).)

Our Supreme Court has also indicated, however, that "domestic water delivery through a pipeline is a property-related service within the meaning of [article XIII D]. ([*Richmond*, *supra*, 32 Cal.4th] at pp. 426–427.) Accordingly, once a property owner . . . has paid

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costs of a public improvement. They do not, however, establish that any levy imposed to pay maintenance and operation costs of a public improvement is necessarily an assessment. As previously noted, article XIII D, section 6, subdivision (b) authorizes agencies to impose fees to cover the cost of providing immediately available water service, which necessarily includes maintenance and operating costs.

[12] The parties focus on water service in their briefs because only water service is metered and thus can be discontinued in a physical sense by having the District lock the meter. We too focus our discussion on the District's water service.

the connection charges and has become a customer of a public water agency, all charges for water *delivery* incurred thereafter are charges for a property-related service, whether the charge is calculated on the basis of consumption or is imposed as a fixed monthly fee." (*Bighorn, supra,* 39 Cal.4th at p. 217, italics added, fn. omitted.) "At least as to fees and charges that are property related, section 6 of California Constitution article XIII D would appear to embody the electorate's intent as to when voter-approval should be required, or not required, before existing fees may be increased or new fees imposed, and the electorate chose not to impose a voter-approval requirement for increases in water service charges." (*Id.* at p. 219.) As a consequence, so long as the water service is immediately available to Paland, it is exempt from the requirement for property owner approval.

As far as we are aware, no published decision has yet directly addressed the precise question before us: how to distinguish between charges for services that are "immediately available" to property owners though not actually used, which are fees under the initiative, and standby charges for "potential or future use of a service," which are defined as assessments. In *Keller*, the court was not presented with the issue because the parties agreed that the charges in dispute were standby charges that are classified as assessments under Proposition 218. (*Keller, supra,* 80 Cal.App.4th at p. 1011.) *Keller* states the charges were "levied on all property capable of receiving water from the District, even if the property owners did not use the District's water," but the opinion does not clarify whether "capable of

receiving water" meant that the affected parcels were all already connected to the water's system, could be connected to the water system immediately at the owner's will, or could be connected once construction of the District's water system was completed at some future date. (*Ibid.*; see also *id.* at p. 1009.) In *Bighorn*, the Supreme Court, considering the validity of a voter initiative to reduce domestic water rates and to require voter approval for future increases, held that water delivery rates charged to parcels with connections were fees within the meaning of article XIII D, section 6 regardless of whether they were based on usage or were flat monthly fees used to pay the system's fixed costs. (*Bighorn, supra,* 39 Cal.4th at pp. 216–217 [rejecting argument that rates based on usage were not subject to Proposition 218]; see also *Richmond*, *supra*, 32 Cal.4th at pp. 426–427 [a public water agency's charges for ongoing water delivery are fees and charges within the meaning of article XIII D].) Similarly, in *Roseville*, the Third District held that charges imposed on parcels with connections to the agency's water and sewer systems irrespective of use were fees within the meaning of article XIII D, section 6. (*Roseville, supra*, 97 Cal.App.4th at pp. 642–645 [rejecting an argument that the fees were not subject to Proposition 218].) None of these cases considered inactive connections, or what constituted an immediately available service.

"When interpreting a provision of our state Constitution, our aim is 'to determine and effectuate the intent of those who enacted the constitutional provision at issue.' [Citation.] When, as here, the voters enacted the provision, their intent governs.

[Citation.] To determine the voters' intent, 'we begin by examining the constitutional text, giving the words their ordinary meanings.' [Citation.]" (*Bighorn, supra,* 39 Cal.4th at p. 212.) We turn to the purpose of the initiative to clarify the voters' intent. (Art. XIII D, § 6, subd. (b)(4); see *Silicon Valley Taxpayers' Assn., Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 448 [Proposition 218 states that it should be liberally construed to effectuate its purposes].) The Supreme Court has explained that "Proposition 218 was designed to: constrain local governments' ability to impose assessments; place extensive requirements on local governments charging assessments; shift the burden of demonstrating assessments' legality to local government; make it easier for taxpayers to win lawsuits; and limit the methods by which local governments exact revenue from taxpayers without their consent." (*Silicon Valley Taxpayers' Assn., Inc., supra*, at p. 448.) To achieve these purposes, the initiative imposed both procedural (art. XIII D, §§ 4, subds. (a)–(e), 6, subds. (a), (c)) and substantive (*id.*, §§ 4, subd. (f), 6, subd. (b)) constraints on assessments and property-related fees.

The terms "immediately available" and "potential or future use of a service" as used in the initiative are relative and inherently imprecise. Construed narrowly, service is "immediately available" only if, as Paland suggests, water flows out of a faucet when the property owner turns on the tap. However, voters might reasonably have intended "immediately available" to include circumstances where the District has provided utility connections

directly to the owner's parcel and the service is "immediately available" subject only to the volitional decision of the property owner to request service.

In the context of the entire initiative, the requirement that fees be imposed only for service that is "actually used . . . or immediately available" is best understood as a substantive constraint on the agency and the purposes for which the agency acts. An assessment is "a charge on land[, and] is commonly reflected in its being secured by a lien on the charged property." (*Pajaro Valley Water Management Agency v. Amrhein, supra,* 150 Cal.App.4th at p. 1382, italics omitted; see § 53931.) *Assessments* for water and sewer services must be justified by an engineer's report and submitted to a weighted vote of affected property owners. (Art. XIII D, § 4.) *Fees* for water and sewer services (and refuse collection services) may be imposed after notice and a public hearing, and are specifically exempted from the requirement for a property owner vote. (Art. XIII D, § 6.) They are not automatically liens, but become a lien on the owner's property only at the option of the district when delinquent and a certificate of delinquency is recorded. (§ 61115, subd. (c).) This scheme suggests that voters perceived a greater danger of government abuse in the imposition of water (and sewer) related assessments imposed on real property than in the imposition of fees, and also recognized the need for agencies to determine rates for such services, allowing the agency to provide for necessary continuing operation and maintenance of the systems without the undue burden of potential owner veto. We conclude that this difference is also reflected in the

additional *substantive* constraint on fees contained within article XIII D, section 6, subdivision (b), which bars agencies from using fees to extract revenue that is not immediately translated into tangible service to the property owner.[13]

We conclude the "immediately available" requirement is logically focused on the agency's conduct, not the property owner's. As long as the agency has provided the necessary service connections at the charged parcel and it is only the unilateral act of the property owner (either in requesting termination of service or failing to pay for service) that causes the service not to be actually used, the service is "immediately available" and a charge for the service is a fee rather than an assessment (assuming the other substantive requirements of a fee are satisfied).

Here Paland long ago paid the connection charges and became a customer of the District, with water and sewer services provided through pipes

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[13] Article XIII D, section 6, subdivision (b) states, "Requirements for Existing, New or Increased Fees and Charges. A fee or charge shall not be extended, imposed, or increased by any agency unless it meets all of the following requirements: [¶] (1) Revenues derived from the fee or charge shall not exceed the funds required to provide the property related service. [¶] (2) Revenues derived from the fee or charge shall not be used for any purpose other than that for which the fee or charge was imposed. [¶] (3) The amount of a fee or charge imposed upon any parcel or person as an incident of property ownership shall not exceed the proportional cost of the service attributable to the parcel. . . ."

physically connected to the property. He cannot contend that the services are not available to him, because quite evidently they have been available at all times he has chosen to use them. The District can and will immediately turn on water service to Paland's property once Paland requests that the service be renewed and satisfies any delinquency. Any lack of immediacy in this process is due solely to circumstances within his control.

A contrary conclusion would lead to an anomalous result whereby an individual property owner could unilaterally preclude collection of his or her pro rata obligation for the maintenance and operation of a utility system absent an owner vote, while the owner of an adjacent parcel with an active connection would have no such option. Further, such an argument, which would divorce the base rates imposed on parcels with *inactive* connections from the base rates imposed on parcels with active connections would take the former rates outside of Proposition 218 altogether, thus undermining rather than assisting Paland's case. In *Richmond*, in deciding that a water connection charge was not subject to Proposition 218 requirements, the Supreme Court held that in order for a charge to be either an assessment or fee within the meaning of Proposition 218, it must apply to parcels that can be identified in advance. (*Richmond, supra*, 32 Cal.4th at pp. 418–419, 427–428; see also *Bighorn, supra,* 39 Cal.4th at pp. 208–209 [in *Richmond*, "[w]e concluded that . . . connection charges were not 'assessments' or 'property-related fees or charges' within the meaning of article XIII D. [Citation.]"].) Both section 4 and

section 6 of article XIII D require agencies to identify affected parcels in advance of imposing an assessment or a fee for purposes of providing notice and conducting the required voter approval procedures. (*Richmond*, at pp. 418–419, 427–428.) Because the decision to discontinue water service is a voluntary act by the property owner that cannot be anticipated by the District, parcels affected by a fee that specifically applied to parcels with *inactive connections* could not be fully identified in advance and the fee would not be covered by Proposition 218 at all.

Paland also makes an argument that his payment of a $1,800 connection fee in 1986 gave him a contractual right to access to the water and sewer systems and that he cannot be charged additional fees for maintenance or operation of the system unless he further burdens the system by actual use, or unless voters approve an assessment. He cites no evidence or authority supporting his contract theory.[14] Nor does he cite statutory or other legal authority barring the District from charging him for maintenance, operation, and capital improvements to the existing

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[14] Paland cites a dissenting opinion for the principle that a municipal utility may not charge property owners for capital improvements that were already financed by the ratepayers or were donated to the utility. (*Hansen v. City of San Buenaventura* (1986) 42 Cal.3d 1172, 1191, 1194–1195 (dis. opn. of Broussard, J.).) This dissenting opinion is neither binding authority nor relevant to the issues before us. Paland presents no evidence that the capital improvements being financed by current base rates were already funded by the connection fee he paid in 1986.

systems once he has paid a connection fee. Both Proposition 218 and the Government Code authorize the District to do just that. (Art. XIII D, § 6, subd. (b)(1)–(4); § 66013, subd. (b)(3) [authorizing capacity charges].) Common sense dictates that continuous maintenance and operation of the water and sewer systems is necessary to keep those systems immediately available to inactive connections like Paland's. As a practical matter, it would be difficult if not impossible for an agency to forecast the costs of operating and maintaining a system into the indefinite future for the purpose of charging all users their proportional share of those costs at the time they first connect to the system.

In sum, we conclude the water and sewer base rates imposed on parcels with water or sewer connections regardless of whether they are active or inactive, and whether or not the property owner uses the services, is a fee subject to the provisions of article XIII D, section 6, not an assessment subject to the requirements of article XIII D, section 4. Paland does not argue that the District failed to comply with the requirements of article XIII D, section 6. Therefore, his Proposition 218 argument fails. In light of this dispositive conclusion, it is unnecessary for us to address Paland's other arguments.[15]

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[15] Paland argues that the trial court erred by dismissing a portion of his complaint on statute of limitations grounds, makes a related procedural due process argument, and contends the trial court erred in not issuing a formal statement of decision, in misallocating the burden of proof, and in excluding evidence.

Bruiniers, J.

We concur:

Simons, Acting P. J.

Needham, J.

A122630

Superior Court of Mendocino County, No. SCUK CVG 07 99168, Cindee F. Mayfield, Judge.

David Paland, in pro. per., for Plaintiff and Appellant.

Christopher J. Neary for Defendant and Respondent.

APPENDIX B

Court of Appeal, First Appellate District, Division Five - A122630

S176094

IN THE SUPREME COURT OF CALIFORNIA

En Banc

DAVID PALAND, Plaintiff and Appellant,

v.

BROOKTRAILS TOWNSHIP COMMUNITY SERVICES DISTRICT BOARD OF DIRECTORS, Defendant and

Respondent.

The petition for review is denied.

/s/ George
Chief Justice

[Filed February 10, 2010]

APPENDIX C

Filed 07/31/09

CERTIFIED FOR PUBLICATION
IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FIVE

DAVID PALAND, Plaintiff and Appellant, v. BROOKTRAILS TOWNSHIP COMMUNITY SERVICES DISTRICT BOARD OF DIRECTORS, Defendant and Respondent.	A122630 (Mendocino County Super. Ct. No. SCUK CVG 07 99168)

This appeal requires us to construe certain provisions in the taxpayer initiative Proposition 218 (Cal. Const., arts. XIII C, XIII D)[1] distinguishing between what may properly be classified as a property-related fee, exempt from a requirement for ballot approval by a majority of affected property owners, and an assessment for which such a vote is mandated. We conclude that a minimum charge

[1] All article references are to articles of the California Constitution.

imposed on parcels with connections to a water district's utility systems for the basic cost of providing water or sewer service, regardless of actual use, is a charge for an immediately available property-related service as defined in article XIII D, section 6, subdivision (b)(4), and consequently does not require ballot approval by affected owners. We therefore affirm the trial court's judgment for the water district.

BACKGROUND

The Brooktrails Township Community Services District (District) was formed to provide water and sewer service to about 6,500 real property parcels in or near Willits, California. (Gov. Code, § 61000 et seq.)[2] About 1,536 of the parcels are currently connected to the District's water system, and about 1,490 are connected to its sewer system. The rest of the parcels are undeveloped and not yet connected to the District's utility systems. Parcels not connected to the water and sewer systems are charged annual water availability and sewer standby fees. Parcels connected to the water and sewer systems are charged connection fees at the time of hookup to the systems, and thereafter fixed monthly water and sewer "base rates," as well as inclining usage-based rates for water service. The sewer connection is not a metered service, and is therefore not subject to a usage charge beyond the monthly base rate.

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[2] All statutory references are to the Government Code unless otherwise indicated.

Appellant David Paland, a property owner in the District, connected his parcel to the water and sewer systems in 1986 and paid $1,800 in connection fees. In the decades that followed, he periodically discontinued his water service when he was away from his home for extended periods of time or when he asserts he could not afford the service. On such occasions, he was historically charged a prorated amount of the water and sewer base rates for the month in which his service was discontinued and was not charged again until he requested reactivation of his water service. Until 2003, it was District policy not to charge base rates to parcels with existing connections that were inactive because the parcels were either undeveloped or unoccupied, or because the owners had temporarily discontinued their service.

The District changed its policy in 2003. At the time, the state Department of Health Services had imposed a moratorium on new connections pending an increase in the District's water storage capacity. The Department of Health Services mandates increased the District's capital investment costs and eliminated its income from new connections.[3] On March 11, 2003, the District's Board of Directors (Board) decided to begin charging established monthly base rates[4] to parcels with existing utility

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[3] Counsel for the District represented that the cost of a new connection, assuming one could be obtained at all, was about $10,000 at the time of trial.

[4] The base rates charged to connected parcels are used to pay the fixed costs of operating and maintaining the water and sewer systems, as well as the capital costs of increasing the District's

connections, regardless of whether the owner was actually using the District's services.[5] On April 24, 2003, District General Manager Michael Chapman wrote to Paland and 20 other property owners with currently or periodically inactive water meters informing them of the change of policy.

Paland protested the new policy. He questioned Board's statutory authority to impose monthly base rates on inactive connections, arguing that the practice was "in the nature of a standby fee" and that the Board had not complied with Proposition 218 or due process. Although the Board did not rescind its policy, Paland took no immediate legal action because he "did not become aware that the thing had actually gone through as any kind of ordinance . . . ." He did not discontinue his water service between 2003 and 2006.

In late 2006, Paland fell behind on his monthly bills. In October 2006, the District notified him that his service would be shut off if he did not pay the arrears. In a letter to the District General Manager dated December 25, 2006, Paland wrote that his water had been turned off, that he would pay the arrears as soon as he could, that he could not afford to pay ongoing base rates because he was unemployed, and, "For that reason, I have no plans to ask you to

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storage capacity so that it can continue to serve those already-connected customers.

[5] Monthly base rates for water service were $32.45 at the time of trial, and the basic monthly sewage fee was $30.07.

turn the water back on until I can afford the huge base rate."

By the end of January 2007, Paland apparently had paid his arrears through November 2006. Paland's subsequent monthly bills reflect no actual water usage. The District, however, continued to charge Paland the monthly base rates for both water and sewer services.

On May 17, 2007, Paland sued the Board for declaratory and injunctive relief.

He alleged that in 2007, pursuant to the 2003 policy, the District began charging him monthly base rates (as adopted in Resolution No. 2006-17 on June 27, 2006) for time periods when he had requested that his water service be turned off. He again argued the monthly base rates, when charged to customers whose water service had been turned off, were "standby charges" subject to the owner voting requirements of article XIII D, section 4, and that the District had failed to comply with those requirements. He sought a declaration that Resolution No. 2006-17 was invalid on its face and as applied to him and also sought an injunction barring the resolution's enforcement "prior to complying with applicable voting laws." The District filed a demurrer on the ground that the complaint was filed outside the limitations period of section 66022, which provides that any judicial action to challenge a local agency resolution adopting a new fee or service charge must be commenced within 120 days of the effective date of the resolution. (§ 66022, subd. (a).) The court sustained the demurrer with leave to amend.

Paland filed an amended complaint alleging that the District adopted new water and sewer base rates on June 26, 2007, in Resolution No. 2007-10, that the resolution was subject to the requirements of article XIII D, section 4, and that the District had not complied with those requirements. The Board answered the amended complaint and filed a motion to dismiss on statute of limitations grounds. The trial court ruled that Paland's renewed challenge to the 2003 policy was time-barred, but his challenge to the 2007 action of the Board was not.

Trial took place on July 8, 2008. At the conclusion of the one-day trial, the court made the following oral ruling:[6] "As to the request for declaratory relief as to Resolution 2007-10, the court finds that the Defendant or Respondent's resolution is constitutionally valid and in compliance with all applicable law. It appears that the appropriate procedures under Prop 218 for changing a rate and having it be in proportion, giving due notice to those affected, if [they] applied at all, were followed in this case. [¶] On the other hand, I think that what is driving this litigation is a fundamental confusion about whether the type of fees that Petitioner, Mr. Paland, is challenging are in fact standby fees or assessments. The court finds that they are not. [¶] The water and sewer fees in question are in fact user

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[6] Paland made an oral request for a written statement of decision. That request was denied by the court on the basis that the trial had been of less than eight hours duration. (Code Civ. Proc., § 632). His subsequent written request was denied as well.

fees which can be increased to reflect capital improvements, changes in costs for providing the service, and that a base rate is a proper and important component of such a change in fee. [¶] For these reasons the court denies the request for injunctive relief and finds that Petitioner or Plaintiff shall take nothing by his complaint." The court entered judgment for the Board.

DISCUSSION

The core issue in this appeal is whether the imposition of minimum monthly water and sewer base rates on parcels connected to the District utility systems, regardless of actual usage, is a property assessment subject to owner ballot approval requirements adopted in Proposition 218, or is instead a fee or charge for a property-related service exempted from those requirements.[7] Paland argues only that the District failed to comply with Proposition 218's procedural and voting requirements for *assessments*, and does not contend that the District failed to comply with requirements for imposition of *fees*. We conclude the disputed charges are fees and not assessments as defined in the initiative.

In 1996, California voters passed Proposition 218, which added articles XIII C and XIII D to the California Constitution. The initiative was intended to close perceived loopholes in the restrictions on

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[7] The District does not contest that the charges are subject to Proposition 218, but only disputes Paland's claim that they are assessments rather than fees under the terms of the initiative.

property taxes imposed by Proposition 13.[8] (*Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 838–839; *Howard Jarvis Taxpayers Assn. v. City of Riverside* (1999) 73 Cal.App.4th 679, 681 (*Riverside*).) Articles XIII C and XIII D "allow[] only four types of local property taxes: (1) an ad valorem property tax; (2) a special tax; (3) an assessment; and (4) a fee or charge." (*Riverside, supra*, at p. 682.) Article XIII C imposes restrictions on general and special property taxes in addition to those imposed under article XIII A, and requires voter approval for any general or special tax imposed by a local governmental entity. The second component of Proposition 218, article XIII D, is addressed to "Assessment and Property-Related Fee Reform," and it "undertakes to constrain the imposition by local governments of 'assessments, fees and charges.' (Art. XIII D, § 1.)" (*Pajaro Valley Water Management Agency v. Amrhein* (2007) 150 Cal.App.4th 1364, 1378.) "Article XIII D sets forth procedures, requirements and voter approval mechanisms for local government assessments, fees and charges." (*Howard Jarvis Taxpayers Assn. v. City of Roseville* (2002) 97 Cal.App.4th 637, 640 (*Roseville*).)

The procedures for imposing new or increased fees are set forth in Article XIII D, section 6, subdivisions (a) and (c). Article XIII D section 6, subdivision (c), provides that, if a majority of affected owners protest

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[8] Proposition 13, which was adopted by voters on June 6, 1978, added article XIII A to the California Constitution. (*Knox v. City of Orland* (1992) 4 Cal.4th 132, 140.)

a proposed fee (as provided under article XIII D § 6, subd. (a)), then, "[e]xcept for fees or charges for sewer, water, and refuse collection services, no property-related fee or charge shall be imposed or increased unless and until that fee or charge is submitted and approved by a majority vote of the property owners of the property subject to the fee or charge or, at the option of the agency, by a two-thirds vote of the electorate residing in the affected area." Article XIII D defines fee or charge[9] as "any levy other than an ad valorem tax, a special tax, or an assessment, imposed by an agency upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property-related service." (Art. XIII D, § 2, subd. (e).) "Property-related service" is defined as "a public service having a direct relationship to property ownership." (*Id.*, § 2, subd. (h).) Section 4 of article XIII D provides more stringent requirements for the imposition of an assessment than those required for a property-related fee or charge under section 6.[10]

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[9] "Fee" and "charge" appear to be synonymous in article XIII D. (*Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205, 214, fn. 4 (*Bighorn*).) Hereafter, we use the term "fee" to refer to both.

[10] "A local public agency may not impose an assessment . . . unless: (1) the agency identifies 'all parcels which will have a special benefit conferred upon them and upon which an assessment will be imposed' (art. XIII D, § 4, subd. (a)); (2) the agency obtains an engineer's report that supports the assessment (*id.*, § 4, subd. (b)); (3) the assessment does not exceed the reasonable cost of the proportional special benefit conferred on the affected parcel (*id.*, § 4, subds. (a) & (f)); and (4) after giving

The narrow focus of this dispute is the proper interpretation and application of article XIII D, section 6, subdivision (b)(4), which provides "A fee or charge shall not be extended, imposed, or increased by any agency unless it meets all of the following requirements: [¶] . . . [¶] (4) No fee or charge may be imposed for a service unless that service is actually used by, or *immediately available to*, the owner of the property in question. Fees or charges based on potential or future use of a service are not permitted. *Standby charges, whether characterized as charges or assessments, shall be classified as assessments and shall not be imposed without compliance with Section 4.*" (Art. XIII D, § 6, subd. (b)(4), italics added.)

Paland argues that, despite the existence of a metered connection for water service at his parcel, that service is still not immediately available to him, and to those similarly situated with inactive connections, and therefore the imposition of minimum base rates on such parcels is a standby charge that must be classified as an assessment under article XIII D, section 6, subdivision (b)(4).[11] He asserts that water

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notice to affected property owners and holding a public hearing, the agency does not receive a majority protest based on ballots 'weighted according to the proportional financial obligation of the affected property' (*id.*, § 4, subds. (c)–(e))." (*Richmond v. Shasta Community Services Dist.* (2004) 32 Cal.4th 409, 418 (*Richmond*).)

[11] Paland also contends that charges for maintenance and operations costs are by definition assessments rather than fees within the meaning of Proposition 218. He cites the definition of "assessments" in the Legislature's statutory implementation of the initiative, which provides: " 'Assessment' means any levy or charge by an agency upon real property that is based upon the

service[12] is not immediately available to him when his connection is inactive because the District would have to unlock his water meter before he could use the service. Also, he argues the service is not immediately available because the District will not unlock his meter unless he pays his past-due bills. In his view, the service is not immediately available unless he can "twist his tap and turn on the water." If, as Paland contends, the minimum monthly base rate charged by the District is indeed a standby charge, it would

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special benefit conferred upon the real property by a public improvement or service, *that is imposed to pay* the capital cost of the public improvement, *the maintenance and operation expenses of the public improvement*, or the cost of the service being provided." (§ 53750, subd. (b), italics added.) Similar language appears in the initiative. (See art. XIII D, § 5, subd. (a) [exempting assessments predating Proposition 218 imposed exclusively to finance the capital costs *or maintenance and operation expenses* for water and sewer systems, except for subsequent increases].) These provisions establish that an assessment may be imposed to pay maintenance and operation costs of a public improvement. They do not, however, establish that any levy imposed to pay maintenance and operation costs of a public improvement is necessarily an assessment. As previously noted, article XIII D, section 6, subdivision (b) authorizes agencies to impose fees to cover the cost of providing immediately available water service, which necessarily includes maintenance and operating costs.

[12] The parties focus on water service in their briefs because only water service is metered and thus can be discontinued in a physical sense by having the District lock the meter. We too focus our discussion on the District's water service. Paland does not argue that a service, such as the sewer service, ceases to be "immediately available" when a property owner simply stops using it.

unquestionably be subject to article XIII D, section 4 assessment approval procedures. (Art. XIII D, § 5, subd. (a); *Keller v. Chowchilla Water Dist.* (2000) 80 Cal.App.4th 1006, 1012 (*Keller*).)

Our Supreme Court has also indicated, however, that "domestic water delivery through a pipeline is a property-related service within the meaning of [article XIII D]. ([*Richmond, supra*, 32 Cal.4th] at pp. 426–427.) Accordingly, once a property owner . . . has paid the connection charges and has become a customer of a public water agency, all charges for water *delivery* incurred thereafter are charges for a property-related service, whether the charge is calculated on the basis of consumption or is imposed as a fixed monthly fee." (*Bighorn, supra,* 39 Cal.4th at p. 217, italics added, fn. omitted.) "At least as to fees and charges that are property related, section 6 of California Constitution article XIII D would appear to embody the electorate's intent as to when voter-approval should be required, or not required, before existing fees may be increased or new fees imposed, and the electorate chose not to impose a voter-approval requirement for increases in water service charges." (*Id.* at p. 219.) As a consequence, so long as the water service is immediately available to Paland, it is exempt from the requirement for property owner approval.

As far as we are aware, no published decision has yet directly addressed the precise question before us: how to distinguish between charges for services that are "immediately available" to property owners though not actually used, which are fees under the initiative, and standby charges for "potential or future use of a service," which are defined as assessments. In *Keller*,

the court was not presented with the issue because the parties agreed that the charges in dispute were standby charges that are classified as assessments under Proposition 218. (*Keller, supra,* 80 Cal.App.4th at p. 1011.) *Keller* states the charges were "levied on all property capable of receiving water from the District, even if the property owners did not use the District's water," but the opinion does not clarify whether "capable of receiving water" meant that the affected parcels were all already connected to the water's system, could be connected to the water system immediately at the owner's will, or could be connected once construction of the District's water system was completed at some future date. (*Ibid.*; see also *id.* at p. 1009.) In *Bighorn*, the Supreme Court, considering the validity of a voter initiative to reduce domestic water rates and to require voter approval for future increases, held that water delivery rates charged to parcels with connections were fees within the meaning of article XIII D, section 6 regardless of whether they were based on usage or were flat monthly fees used to pay the system's fixed costs. (*Bighorn, supra,* 39 Cal.4th at pp. 216–217 [rejecting argument that rates based on usage were not subject to Proposition 218]; see also *Richmond*, *supra*, 32 Cal.4th at pp. 426–427 [a public water agency's charges for ongoing water delivery are fees and charges within the meaning of article XIII D].) Similarly, in *Roseville*, the Third District held that charges imposed on parcels with connections to the agency's water and sewer systems irrespective of use were fees within the meaning of article XIII D, section 6. (*Roseville, supra*, 97 Cal.App.4th at pp. 642–645 [rejecting an argument that the fees were not subject

to Proposition 218].) None of these cases considered inactive connections, or what constituted an immediately available service.

"When interpreting a provision of our state Constitution, our aim is 'to determine and effectuate the intent of those who enacted the constitutional provision at issue.' [Citation.] When, as here, the voters enacted the provision, their intent governs. [Citation.] To determine the voters' intent, 'we begin by examining the constitutional text, giving the words their ordinary meanings.' [Citation.]" (*Bighorn, supra,* 39 Cal.4th at p. 212.) We turn to the purpose of the initiative to clarify the voters' intent. (Art. XIII D, § 6, subd. (b)(4); see *Silicon Valley Taxpayers' Assn., Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 448 [Proposition 218 states that it should be liberally construed to effectuate its purposes].) The Supreme Court has explained that "Proposition 218 was designed to: constrain local governments' ability to impose assessments; place extensive requirements on local governments charging assessments; shift the burden of demonstrating assessments' legality to local government; make it easier for taxpayers to win lawsuits; and limit the methods by which local governments exact revenue from taxpayers without their consent." (*Silicon Valley Taxpayers' Assn., Inc., supra*, at p. 448.) To achieve these purposes, the initiative imposed both procedural (art. XIII D, §§ 4, subds. (a)–(e), 6, subds. (a), (c)) and substantive (*id.*, §§ 4, subd. (f), 6, subd. (b)) constraints on assessments and property-related fees.

The terms "immediately available" and "potential or future use of a service" as used in the initiative are relative and inherently imprecise. Construed narrowly, service is "immediately available" only if, as Paland suggests, water flows out of a faucet when the property owner turns on the tap. However, voters might reasonably have intended "immediately available" to include circumstances where the District has provided utility connections directly to the owner's parcel and the service is "immediately available" subject only to the volitional decision of the property owner to request service.

In the context of the entire initiative, the requirement that fees be imposed only for service that is "actually used . . . or immediately available" is best understood as a substantive constraint on the agency and the purposes for which the agency acts. An assessment is "a charge on land[, and] is commonly reflected in its being secured by a lien on the charged property." (*Pajaro Valley Water Management Agency v. Amrhein, supra,* 150 Cal.App.4th at p. 1382, italics omitted; see § 53931.) *Assessments* for water and sewer services must be justified by an engineer's report and submitted to a weighted vote of affected property owners. (Art. XIII D, § 4.) *Fees* for water and sewer services (and refuse collection services) may be imposed after notice and a public hearing, and are specifically exempted from the requirement for a property owner vote. (Art. XIII D, § 6.) They are not automatically liens, but become a lien on the owner's property only at the option of the district when delinquent and a certificate of delinquency is recorded. (§ 61115, subd. (c).) This scheme suggests

that voters perceived a greater danger of government abuse in the imposition of water (and sewer) related assessments imposed on real property than in the imposition of fees, and also recognized the need for agencies to determine rates for such services, allowing the agency to provide for necessary continuing operation and maintenance of the systems without the undue burden of potential owner veto. We conclude that this difference is also reflected in the additional *substantive* constraint on fees contained within article XIII D, section 6, subdivision (b), which bars agencies from using fees to extract revenue that is not immediately translated into tangible service to the property owner.[13]

We conclude the "immediately available" requirement is logically focused on the agency's conduct, not the property owner's. As long as the agency has provided the necessary service connections at the charged parcel and it is only the unilateral act of the property owner (either in requesting

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[13] Article XIII D, section 6, subdivision (b) states, "Requirements for Existing, New or Increased Fees and Charges. A fee or charge shall not be extended, imposed, or increased by any agency unless it meets all of the following requirements: [¶] (1) Revenues derived from the fee or charge shall not exceed the funds required to provide the property related service. [¶] (2) Revenues derived from the fee or charge shall not be used for any purpose other than that for which the fee or charge was imposed. [¶] (3) The amount of a fee or charge imposed upon any parcel or person as an incident of property ownership shall not exceed the proportional cost of the service attributable to the parcel. . . ." (Art. XIII D, § 6, subd. (b).)

termination of service or failing to pay for service) that causes the service not to be actually used, the service is "immediately available" and a charge for the service is a fee rather than an assessment (assuming the other substantive requirements of a fee are satisfied).

Here Paland long ago paid the connection charges and became a customer of the District, with water and sewer services provided through pipes physically connected to the property. He cannot contend that the services are not available to him, because quite evidently they have been available at all times he has chosen to use them. The District can and will immediately turn on water service to Paland's property once Paland requests that the service be renewed and satisfies any delinquency. Any lack of immediacy in this process is due solely to circumstances within his control.

A contrary conclusion would lead to an anomalous result whereby an individual property owner could unilaterally preclude collection of his or her pro rata obligation for the maintenance and operation of a utility system absent an owner vote, while the owner of an adjacent parcel with an active connection would have no such option. Further, such an argument, which would divorce the base rates imposed on parcels with *inactive* connections from the base rates imposed on parcels with active connections would take the former rates outside of Proposition 218 altogether, thus undermining rather than assisting Paland's case. In *Richmond*, in deciding that a water connection charge was not subject to Proposition 218 requirements, the Supreme Court

held that in order for a charge to be either an assessment or fee within the meaning of Proposition 218, it must apply to parcels that can be identified in advance. (*Richmond, supra*, 32 Cal.4th at pp. 418–419, 427–428; see also *Bighorn, supra*, 39 Cal.4th at pp. 208–209 [in *Richmond*, "[w]e concluded that . . . connection charges were not 'assessments' or 'property-related fees or charges' within the meaning of article XIII D. [Citation.]"].) Both section 4 and section 6 of article XIII D require agencies to identify affected parcels in advance of imposing an assessment or a fee for purposes of providing notice and conducting the required voter approval procedures. (*Richmond*, at pp. 418–419, 427–428.) Because the decision to discontinue water service is a voluntary act by the property owner that cannot be anticipated by the District, parcels affected by a fee that specifically applied to parcels with *inactive connections* could not be fully identified in advance and the fee would not be covered by Proposition 218 at all.

Paland also makes an argument that his payment of a $1,800 connection fee in 1986 gave him a contractual right to access to the water and sewer systems and that he cannot be charged additional fees for maintenance or operation of the system unless he further burdens the system by actual use, or unless voters approve an assessment. He cites no evidence or authority supporting his contract theory.[14] Nor does

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[14] Paland cites a dissenting opinion for the principle that a municipal utility may not charge property owners for capital improvements that were already financed by the ratepayers or were donated to the utility. (*Hansen v. City of San Buenaventura*

he cite statutory or other legal authority barring the District from charging him for maintenance, operation, and capital improvements to the existing systems once he has paid a connection fee. Both Proposition 218 and the Government Code authorize the District to do just that. (Art. XIII D, § 6, subd. (b)(1)–(4); § 66013, subd. (b)(3) [authorizing capacity charges].) Common sense dictates that continuous maintenance and operation of the water and sewer systems is necessary to keep those systems immediately available to inactive connections like Paland's. As a practical matter, it would be difficult if not impossible for an agency to forecast the costs of operating and maintaining a system into the indefinite future for the purpose of charging all users their proportional share of those costs at the time they first connect to the system.

In sum, we conclude the water and sewer base rates imposed on parcels with water or sewer connections regardless of whether they are active or inactive, and whether or not the property owner uses the services, is a fee subject to the provisions of article XIII D, section 6, not an assessment subject to the requirements of article XIII D, section 4. Paland does not argue that the District failed to comply with the requirements of article XIII D, section 6. Therefore,

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(1986) 42 Cal.3d 1172, 1191, 1194–1195 (dis. opn. of Broussard, J.).) This dissenting opinion is neither binding authority nor relevant to the issues before us. Paland presents no evidence that the capital improvements being financed by current base rates were already funded by the connection fee he paid in 1986.

his Proposition 218 argument fails. In light of this dispositive conclusion, it is unnecessary for us to address Paland's other arguments.[15]

DISPOSITION

The judgment is affirmed. Paland shall pay the District's costs on appeal.

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Bruiniers, J.

We concur:

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Simons, Acting P. J.

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Needham, J.

A122630

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Superior Court of Mendocino County, No. SCUK CVG 07 99168, Cindee F. Mayfield, Judge.
David Paland, in pro. per., for Plaintiff and Appellant.
Christopher J. Neary for Defendant and Respondent.

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[15] Paland argues that the trial court erred by dismissing a portion of his complaint on statute of limitations grounds, makes a related procedural due process argument, and contends the trial court erred in not issuing a formal statement of decision, in misallocating the burden of proof, and in excluding evidence.

APPENDIX D

Filed 8/27/09

CERTIFIED FOR PUBLICATION
IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FIVE

DAVID PALAND, Plaintiff and Appellant, v. BROOKTRAILS TOWNSHIP COMMUNITY SERVICES DISTRICT BOARD OF DIRECTORS, Defendant and Respondent.	A122630 (Mendocino County Super. Ct. No. SCUK CVG 07 99168)

THE COURT:

The opinion filed on July 31, 2009, is modified as follows:

On page 8, footnote 12, delete the last sentence: "Paland does not argue that a service, such as the sewer service, ceases to be 'immediately available' when a property owner simply stops using it."

This modification does not change the judgment.

Appellant's petition for rehearing is denied.

Dated Aug 27 2009 Jones, P.J.

APPENDIX E

[Filed October 14, 2009]
Court of Appeal, First Appellate District, Division Five - A122630

S176094
IN THE SUPREME COURT OF CALIFORNIA
En Banc

DAVID PALAND, Plaintiff and Appellant,

v.

BROOKTRAILS TOWNSHIP COMMUNITY SERVICES DISTRICT BOARD OF DIRECTORS, Defendant and Respondent.

At the request of the Court of Appeal, review is ordered on this court's own motion.

This cause is transferred to the Court of Appeal, First Appellate District, Division Five, for reconsideration in light of the requests for depublication that have been filed in this court. The requests for depublication filed herein are denied as moot.

The petition for review is denied.

/s/ George	/s/ Chin
Chief Justice	*Associate Justice*
/s/ Kennard	/s/ Moreno

Associate Justice	*Associate Justice*
/s/ Baxter	/s/ Corrigan
Associate Justice	*Associate Justice*
/s/ Werdegar	
Associate Justice	

APPENDIX F

ARTICLE XIIIC. VOTER APPROVAL FOR LOCAL TAX LEVIES

[New article adopted 1996 General Election by initiative measure. Table of contents supplied by editor, as follows:]

1. Definitions
2. Local Government Tax Limitation
3. Initiative Power for Local Taxes, Assessments, Fees and Charges

Art. 13C, §1. Definitions.

As used in this article:

(a) "General tax" means any tax imposed for general governmental purposes.

(b) "Local government" means any county, city, city and county, including a charter city or county, any special district, or any other local or regional governmental entity.

(c) "Special district" means an agency of the State, formed pursuant to general law or a special act, for the local performance of governmental or proprietary functions with limited geographic boundaries including, but not limited to, school districts and redevelopment agencies.

(d) "Special tax" means any tax imposed for specific purposes, including a tax imposed for specific purposes, which is placed into a general fund. [New article adopted 1996 General Election by initiative measure.]

Art. 13C, §2. Local Government Tax Limitation.

Notwithstanding any other provision of this Constitution:

(a) All taxes imposed by any local government shall be deemed to be either general taxes or special taxes. Special purpose districts or agencies, including school districts, shall have no power to levy general taxes.
(b) No local government may impose, extend, or increase any general tax unless and until that tax is submitted to the electorate and approved by a majority vote. A general tax shall not be deemed to have been increased if it is imposed at a rate not higher than the maximum rate so approved. The election required by this subdivision shall be consolidated with a regularly scheduled general election for members of the governing body of the local government, except in cases of emergency declared by a unanimous vote of the governing body.
(c) Any general tax imposed, extended, or increased, without voter approval, by any local government on or after January 1, 1995, and prior to the effective date of this article, shall continue to be imposed only if approved by a majority vote of the voters voting in an election on the issue of the imposition, which election shall be held within two years of the effective date of this article and in compliance with subdivision (b).
(d) No local government may impose, extend, or increase any special tax unless and until that tax is submitted to the electorate and approved by a two-thirds vote. A special tax shall not be deemed to have been increased if it is imposed at a rate not higher than the maximum rate so approved. [New article adopted 1996 General Election by initiative measure.]

Art. 13C, §3. Initiative Power for Local Taxes, Assessments, Fees and Charges.

Notwithstanding any other provision of this Constitution, including, but not limited to, Sections 8

and 9 of Article II, the initiative power shall not be prohibited or otherwise limited in matters of reducing or repealing any local tax, assessment, fee or charge. The power of initiative to affect local taxes, assessments, fees and charges shall be applicable to all local governments and neither the Legislature nor any local government charter shall impose a signature requirement higher than that applicable to statewide statutory initiatives. [New article adopted 1996 General Election by initiative measure.]

ARTICLE XIIID. [ASSESSMENT AND PROPERTY-RELATED FEE REFORM]

[New article adopted 1996 General Election by initiative measure. Table of contents supplied by editor, as follows:]

1. Application
2. Definitions
3. Property Taxes, Assessments, Fees and Charges Limited
4. Procedures and Requirements for All Assessments
5. Effective Date
6. Property Related Fees and Charges

Art. 13D, §1. Application.

Notwithstanding any other provision of law, the provisions of this article shall apply to all assessments, fees and charges, whether imposed pursuant to state statute or local government charter authority. Nothing in this article or Article XIIIC shall be construed to:

(a) Provide any new authority to any agency to impose a tax, assessment, fee, or charge.

(b) Affect existing laws relating to the imposition of fees or charges as a condition of property development.
(c) Affect existing laws relating to the imposition of timber yield taxes. [New article adopted 1996 General Election by initiative measure.]

Art. 13D, §2. Definitions.

As used in this article:
(a) "Agency" means any local government as defined in subdivision (b) of Section 1 of Article XIIIC.
(b) "Assessment" means any levy or charge upon real property by an agency for a special benefit conferred upon the real property. "Assessment" includes, but is not limited to, "special assessment," "benefit assessment," "maintenance assessment" and "special assessment tax."
(c) "Capital cost" means the cost of acquisition, installation, construction, reconstruction, or replacement of a permanent public improvement by an agency.
(d) "District" means an area determined by an agency to contain all parcels which will receive a special benefit from a proposed public improvement or property-related service.
(e) "Fee" or "charge" means any levy other than an ad valorem tax, a special tax, or an assessment, imposed by an agency upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property related service.
(f) "Maintenance and operation expenses" means the cost of rent, repair, replacement, rehabilitation, fuel, power, electrical current, care, and supervision necessary to properly operate and maintain a permanent public improvement.

(g) "Property ownership" shall be deemed to include tenancies of real property where tenants are directly liable to pay the assessment, fee, or charge in question.
(h) "Property-related service" means a public service having a direct relationship to property ownership.
(i) "Special benefit" means a particular and distinct benefit over and above general benefits conferred on real property located in the district or to the public at large. General enhancement of property value does not constitute "special benefit." [New article adopted 1996 General Election by initiative measure.]

Art. 13D, §3. Property Taxes, Assessments, Fees and Charges Limited.

(a) No tax, assessment, fee, or charge shall be assessed by any agency upon any parcel of property or upon any person as an incident of property ownership except:
(1) The ad valorem property tax imposed pursuant to Article XIII and Article XIIIA.
(2) Any special tax receiving a two-thirds vote pursuant to Section 4 of Article XIIIA.
(3) Assessments as provided by this article.
(4) Fees or charges for property related services as provided by this article.
(b) For purposes of this article, fees for the provision of electrical or gas service shall not be deemed charges or fees imposed as an incident of property ownership. [New article adopted 1996 General Election by initiative measure.]

Art. 13D, §4. Procedures and Requirements for All Assessments.

(a) An agency which proposes to levy an assessment shall identify all parcels which will have a special

benefit conferred upon them and upon which an assessment will be imposed. The proportionate special benefit derived by each identified parcel shall be determined in relationship to the entirety of the capital cost of a public improvement, the maintenance and operation expenses of a public improvement, or the cost of the property related service being provided. No assessment shall be imposed on any parcel which exceeds the reasonable cost of the proportional special benefit conferred on that parcel. Only special benefits are assessable, and an agency shall separate the general benefits from the special benefits conferred on a parcel. Parcels within a district that are owned or used by any agency, the State of California or the United States shall not be exempt from assessment unless the agency can demonstrate by clear and convincing evidence that those publicly owned parcels in fact receive no special benefit.

(b) All assessments shall be supported by a detailed engineer's report prepared by a registered professional engineer certified by the State of California.

(c) The amount of the proposed assessment for each identified parcel shall be calculated and the record owner of each parcel shall be given written notice by mail of the proposed assessment, the total amount thereof chargeable to the entire district, the amount chargeable to the owner's particular parcel, the duration of the payments, the reason for the assessment and the basis upon which the amount of the proposed assessment was calculated, together with the date, time, and location of a public hearing on the proposed assessment. Each notice shall also

include, in a conspicuous place thereon, a summary of the procedures applicable to the completion, return, and tabulation of the ballots required pursuant to subdivision (d), including a disclosure statement that the existence of a majority protest, as defined in subdivision (e), will result in the assessment not being imposed.

(d) Each notice mailed to owners of identified parcels within the district pursuant to subdivision (c) shall contain a ballot which includes the agency's address for receipt of the ballot once completed by any owner receiving the notice whereby the owner may indicate his or her name, reasonable identification of the parcel, and his or her support or opposition to the proposed assessment.

(e) The agency shall conduct a public hearing upon the proposed assessment not less than 45 days after mailing the notice of the proposed assessment to record owners of each identified parcel. At the public hearing, the agency shall consider all protests against the proposed assessment and tabulate the ballots. The agency shall not impose an assessment if there is a majority protest. A majority protest exists if, upon the conclusion of the hearing, ballots submitted in opposition to the assessment exceed the ballots submitted in favor of the assessment. In tabulating the ballots, the ballots shall be weighted according to the proportional financial obligation of the affected property.

(f) In any legal action contesting the validity of any assessment, the burden shall be on the agency to demonstrate that the property or properties in question receive a special benefit over and above the benefits conferred on the public at large and that the

amount of any contested assessment is proportional to, and no greater than, the benefits conferred on the property or properties in question.

(g) Because only special benefits are assessable, electors residing within the district who do not own property within the district shall not be deemed under this Constitution to have been deprived of the right to vote for any assessment. If a court determines that the Constitution of the United States or other federal law requires otherwise, the assessment shall not be imposed unless approved by a two-thirds vote of the electorate in the district in addition to being approved by the property owners as required by subdivision (e). [New article adopted 1996 General Election by initiative measure.]

Art. 13D, §5. Effective Date.

Pursuant to subdivision (a) of Section 10 of Article II, the provisions of this article shall become effective the day after the election unless otherwise provided. Beginning July 1, 1997, all existing, new, or increased assessments shall comply with this article. Notwithstanding the foregoing, the following assessments existing on the effective date of this article shall be exempt from the procedures and approval process set forth in Section 4:

(a) Any assessment imposed exclusively to finance the capital costs or maintenance and operation expenses for sidewalks, streets, sewers, water, flood control, drainage systems or vector control. Subsequent increases in such assessments shall be subject to the procedures and approval process set forth in Section 4.

(b) Any assessment imposed pursuant to a petition signed by the persons owning all of the parcels subject

to the assessment at the time the assessment is initially imposed. Subsequent increases in such assessments shall be subject to the procedures and approval process set forth in Section 4.

(c) Any assessment the proceeds of which are exclusively used to repay bonded indebtedness of which the failure to pay would violate the Contract Impairment Clause of the Constitution of the United States.

(d) Any assessment which previously received majority voter approval from the voters voting in an election on the issue of the assessment. Subsequent increases in those assessments shall be subject to the procedures and approval process set forth in Section 4. [New article adopted 1996 General Election by initiative measure.]

Art. 13D, §6. Property Related Fees and Charges.

(a) Procedures for New or Increased Fees and Charges. An agency shall follow the procedures pursuant to this section in imposing or increasing any fee or charge as defined pursuant to this article, including, but not limited to, the following:

(1) The parcels upon which a fee or charge is proposed for imposition shall be identified. The amount of the fee or charge proposed to be imposed upon each parcel shall be calculated. The agency shall provide written notice by mail of the proposed fee or charge to the record owner of each identified parcel upon which the fee or charge is proposed for imposition, the amount of the fee or charge proposed to be imposed upon each, the basis upon which the amount of the proposed fee or charge was calculated, the reason for the fee or charge, together with the date, time, and

location of a public hearing on the proposed fee or charge.

(2) The agency shall conduct a public hearing upon the proposed fee or charge not less than 45 days after mailing the notice of the proposed fee or charge to the record owners of each identified parcel upon which the fee or charge is proposed for imposition. At the public hearing, the agency shall consider all protests against the proposed fee or charge. If written protests against the proposed fee or charge are presented by a majority of owners of the identified parcels, the agency shall not impose the fee or charge.

(b) Requirements for Existing, New or Increased Fees and Charges. A fee or charge shall not be extended, imposed, or increased by any agency unless it meets all of the following requirements:

(1) Revenues derived from the fee or charge shall not exceed the funds required to provide the property related service.

(2) Revenues derived from the fee or charge shall not be used for any purpose other than that for which the fee or charge was imposed.

(3) The amount of a fee or charge imposed upon any parcel or person as an incident of property ownership shall not exceed the proportional cost of the service attributable to the parcel.

(4) No fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question. Fees or charges based on potential or future use of a service are not permitted. Standby charges, whether characterized as charges or assessments, shall be classified as assessments and shall not be imposed without compliance with Section 4.

(5) No fee or charge may be imposed for general governmental services including, but not limited to, police, fire, ambulance or library services, where the service is available to the public at large in substantially the same manner as it is to property owners. Reliance by an agency on any parcel map, including, but not limited to, an assessor's parcel map, may be considered a significant factor in determining whether a fee or charge is imposed as an incident of property ownership for purposes of this article. In any legal action contesting the validity of a fee or charge, the burden shall be on the agency to demonstrate compliance with this article.

(c) Voter Approval for New or Increased Fees and Charges. Except for fees or charges for sewer, water, and refuse collection services, no property related fee or charge shall be imposed or increased unless and until that fee or charge is submitted and approved by a majority vote of the property owners of the property subject to the fee or charge or, at the option of the agency, by a two-thirds vote of the electorate residing in the affected area. The election shall be conducted not less than 45 days after the public hearing. An agency may adopt procedures similar to those for increases in assessments in the conduct of elections under this subdivision.

(d) Beginning July 1, 1997, all fees or charges shall comply with this section. [New article adopted 1996 General Election by initiative measure.]